Supreme Court, U.S.
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No. 92-1538

In The

Supreme Court of the United States

October Term, 1992

KENNETH HICKS,

Petitioner,

vs.

BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

Brown Group, Inc., d/b/a Brown Shoe Company, Inc., has no parent. Brown Group, Inc. holds no controlling interest in any companies which are not wholly-owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 14.1(g), Petitioner is required to provide "[a] statement of the case containing the facts material to the consideration of the questions presented." (emphasis omitted). Inasmuch as Petitioner failed to provide this Court with a statement including *all* material and procedural facts

relevant herein, Respondent is compelled to provide a brief statement of the case.

In 1982, Kenneth Hicks was terminated from his employment by Brown Group, Inc., d/b/a Brown Shoe Company, Inc., Respondent herein. Hicks brought suit under the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, alleging his termination was improperly motivated by his race, white. In 1988, judgment was entered against Respondent based upon the jury's verdict. While the jury awarded Hicks zero in actual damages, it nonetheless awarded Hicks Ten Thousand Dollars ($10,000) in punitive damages. In response, the court modified the jury verdict by increasing the verdict through a grant of additur, awarding one dollar ($1) in nominal damages.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), despite this Court's earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which clearly held Section 1981 does not provide a cause of action for, *inter alia*, alleged discriminatory discharges. In response, Respondent herein properly and timely filed a Petition for Rehearing *en banc*, which was denied. Accordingly, Respondent filed a Petition for Writ of Certiorari with this Court.

In the interim, a different panel of the Eighth Circuit Court of Appeals criticized *Hicks*, but, albeit reluctantly, followed precedent. *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). Thereafter, the Eighth Circuit granted rehearing *en banc* in *Taggart*, which prompted this Court to vacate the judgment in *Hicks* and remand the cause. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991). After the *en banc* decision in *Taggart* issued, 935 F.2d 947 (8th Cir. 1991), holding discriminatory discharge claims not actionable under Section 1981, an Eighth Circuit panel reversed the judgment in favor of

Hicks and issued a mandate directing the district court to dismiss the Complaint with prejudice. No petition for rehearing was filed. On October 22, 1991, Hicks filed a motion to stay the mandate. By order dated October 28, 1991, however, United States Magistrate David D. Noce dismissed the cause with prejudice. At that point, this cause had been adjudicated under the laws that existed prior to enactment of the Civil Rights Act of 1991.

Thereafter, Judge Noce's previous dismissal was vacated because of a stay issued by the Eighth Circuit. Subsequently, on November 21, 1991, the Civil Rights Act of 1991 was enacted, which provided, in part, that discriminatory discharges are actionable under Section 1981. Based upon this legislative action occurring well after, for practical purposes, disposition of this cause, Hicks filed a Petition for Writ of Certiorari with this Court, after the Eighth Circuit denied Hicks' motion to vacate its October 9, 1991 Order, as well as a motion to extend the stay of the mandate.

This Court, in response, granted the Petition and remanded the case "for further consideration in light of the Civil Rights Act of 1991." 112 S. Ct. 1255 (1992). On remand, the Eighth Circuit, sitting *en banc*, concluded that Section 101 of the 1991 Act does not apply retroactively to the instant case. In support thereof, the Court found the Act ambiguous with respect to legislative intent and, because of the absence of language expressly mandating retroactivity, the Court applied the presumption of prospectivity in accordance with this Court's precedent of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). Accordingly, on December 30, 1992, the Court ordered the cause remanded to the district court with direction to dismiss Hicks' Complaint with prejudice. On February 4, 1993, the mandate arrived in the district court but no mandate has issued in accordance with Rule 41, Federal Rules of Civil Procedure, despite Hicks' inaction in seeking a stay. Nevertheless, Hicks filed another Petition for Writ of Certiorari, to which Respondent herein opposes.

SUMMARY OF ARGUMENT

Petitioner herein urges this Court to grant his Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals to determine: (1) whether claims of racially motivated discharges are actionable under 42 U.S.C. § 1981 in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and (2) whether the Civil Rights Act of 1991 applies retroactively to pending cases. In response, Respondent herein respectfully requests this Court, in its discretion, deny the instant Petition.

With respect to the issue of whether discriminatory discharge claims are actionable under Section 1981, Petitioner has failed to allege or prove the existence of special and important reasons warranting review and, thus, in accordance with Supreme Court Rule 10, certiorari should be denied. First, this particular issue lacks appropriate significance inasmuch as Section 101 of the Civil Rights Act has resolved fully this issue. Further, there has been no showing of an existence of any dispute or confusion concerning the meaning and import of Section 101, which clearly amends and expands Section 1981 to include "termination" of contracts within the meaning of "make and enforce contracts." Moreover, this Court has previously ruled implicitly upon this precise issue in this cause by *vacating* the Eighth Circuit's affirmance that discriminatory discharges were actionable under Section 1981, even in light of *Patterson*. Thus, because this issue has been resolved by the enactment of Section 101, as well as by this Court in the law of the case, review of this issue is not warranted herein, and the instant Petition should be denied.

Second, with respect to the issue of the retroactivity of the Civil Rights Act of 1991, review by this Court herein also is not warranted. At the outset, Petitioner's assertion that the ruling below is in error is wholly insufficient to merit review by this Court. Moreover, contrary to Petitioner's assertion, the Eighth

Circuit's holding below was, in fact, decided correctly on its merits. Because the 1991 Act is *silent* as to retroactivity, in accordance with this Court's ruling in *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), the 1991 Act *must* operate prospectively only. Indeed, the Eighth Circuit has been joined by the D.C., Fifth, Sixth, Seventh and Eleventh Circuits in its view of the prospective application of the 1991 Act.

Further, Petitioner fails to comply with Supreme Court Rule 10 in that he fails to allege a conflict necessitating review by this Court. The Ninth Circuit decision relied upon by Petitioner as establishing a conflict within the meaning of Supreme Court Rule 10, *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), was subsequently vacated. *Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993).

Last, Petitioner's reliance upon this Court's grant of certiorari in two (2) different cases, *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), and *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), in support of his petition herein is misplaced and, once again, fails to establish any circumstance warranting review of the instant cause by this Court. As set out in more detail below, this particular cause, due to its unique factual and procedural posture, will not resolve fully the issue in general. Instead, attempted resolution of the issue through the instant cause would generate further argument and confusion as advocates, as well as the judiciary, begin to distinguish the peculiar facts and posture of this case. Therefore, this case is an inappropriate vehicle upon which to base a grant of certiorari. Indeed, the fact this Court has already granted certiorari to review two (2) cases which "squarely" raise the issue of retroactivity further compels denial of the instant Petition.

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT IS NOT WARRANTED ON THE ISSUE OF WHETHER CLAIMS OF RACIALLY MOTIVATED DISCHARGES ARE ACTIONABLE UNDER 42 U.S.C. § 1981 AFTER *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989), IN THAT THIS ISSUE HAS BEEN RESOLVED.

While Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254, which contains no subject matter jurisdiction, "review on writ of certiorari is not a matter of right, but of judicial discretion" and will be granted only "when there are special and important reasons therefor." S. Ct. R. 10. Petitioner urges this Court to grant certiorari in this case to resolve "once and for all" the issue of whether claims of racially motivated discharge are actionable in light of *Patterson.*

Respondent submits this issue has been resolved by the passage of the Civil Rights Act of 1991 and thus, there are no "special and important reasons" for granting certiorari on this basis. Section 101 of the Civil Rights Act of 1991 amends 42 U.S.C. § 1981 by adding the following subsection:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(Emphasis added). Since its enactment, there has been no dispute as to the meaning of this language — discriminatory discharges are actionable under 42 U.S.C. § 1981.

Because the issue of whether discriminatory discharges are actionable under Section 1981 has been resolved, there are no "special and important" reasons for a grant of certiorari in this respect. Indeed, a primary rationale for granting certiorari is to achieve a uniform application of law. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 470 (1953). There has been no showing that the federal courts have issued conflicting opinions in this regard, nor is there any showing of any dispute concerning the meaning and import of Section 101 of the Civil Rights Act of 1991.

Petitioner nevertheless urges this Court to grant certiorari and "hold that claims of racially motivated discharge from employment violate Section 1981." Petition for Writ of Certiorari, at p. 6. At first glance, it is perplexing why Petitioner even presents this question for review, particularly in light of Section 101 of the Civil Rights Act. Yet, Petitioner's purpose and intent is clear — if this Court would grant certiorari on the issue of the retroactivity of the Civil Rights Act of 1991 and agree with the convincing majority that the 1991 Act is *not* retroactive, the only way Petitioner can prevail on his underlying claim is for this Court to hold discriminatory discharges actionable in light of *Patterson*, regardless of Section 101. Yet, the law of this case evidences that this Court has previously ruled implicitly on this very issue. Prior to the first writ of certiorari being sought of this Court, an Eighth Circuit panel affirmed the lower court's ruling that discriminatory discharges were actionable under Section 1981, despite *Patterson*. Yet, this Court granted certiorari and *vacated* this judgment. Thus, this Court has implicitly ruled, in the law of the case, that discriminatory discharges had never, whether before or after

Patterson, been actionable under Section 1981.[1]

Because this issue has been resolved "once and for all" by the enactment of Section 101, and because this Court has previously ruled implicitly on this issue herein, certiorari should not be granted on this question presented. Petitioner is obviously displeased with the timing of accrual of his cause of action (*e.g.*, before the enactment of the Civil Rights Act) and believes this case has been wrongly decided. However, as noted by Justice Harlan, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Harlan, J., *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 n.6 (1958). Petitioner has been successful thus far, through an abuse of the procedural, judicial processes, in continuing his attempt to resuscitate this cause of action in the hopes of a favorable change in the law. It is time for this cause finally to be put to rest. There simply exist no special or important reasons for a grant of certiorari on the *Patterson* issue, and Petitioner's personal dissatisfaction with the status of the law is not enough.

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1. As this Court is well aware, when the Supreme Court, as opposed to the legislature, acts, it acts *retroactively*. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990) (Scalia, J., concurring). Thus, when *Patterson* was decided, this Court made clear that Section 1981 was *and had been* severely restricted in scope and application, and, to the extent courts of appeals had, before *Patterson*, ruled to the contrary, such rulings had incorrectly interpreted the law.

II.

REVIEW BY THIS COURT TO RESOLVE THE ISSUE OF WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES RETROACTIVELY TO PENDING CASES IS NOT WARRANTED.

Petitioner seeks, once again, to apply the 1991 Act to this cause of action which arose nearly ten (10) years ago and was, in effect, fully adjudicated *before* passage of the 1991 Act. In support thereof, Petitioner advances three (3) propositions which he believes compel a grant of certiorari on the issue of retroactivity of the Civil Rights Act of 1991. All three (3) of Petitioner's propositions fail to warrant review by this Court.

A. Petitioner's Belief That The Eighth Circuit's Ruling Below Is In Error Is Insufficient To Merit Review By This Court.

As noted earlier, that Petitioner believes this matter has been wrongly decided as between the parties does not justify a grant of certiorari. Harlan, J., *supra* p. 8, at 551 n.6. Further, despite Petitioner's apparent beliefs to the contrary, there can be no argument that the Eighth Circuit's ruling in this cause departs so far from "the accepted and usual course of judicial proceedings" that review by this Court is warranted. S. Ct. R. 10.1. Indeed, the decision of the Eighth Circuit is in accord with decisions of the following Circuits: D.C., Fifth, Sixth, Seventh and Eleventh. *E.g., Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Luddington v. Indiana Bell Tele. Co.*, 966 F.2d 225 (7th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992).

Moreover, even if Petitioner's arguments in support of the

alleged error in the Eighth Circuit ruling are addressed, it is evident that the decision below was, in fact, decided correctly on the merits. Congressional intent with respect to retroactivity is indiscernible. *Hicks*, 982 F.2d at 297. The language of Section 402(a) is *silent* as to retroactivity. Moreover, the intense debate and concessions which were exchanged in order to effectuate passage of the Act evidences that Congress "intended to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue." *Id.* (citing *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992)); *see also Gersman*, 975 F.2d at 890. Because the intent of Congress is unclear, the Eighth Circuit applied this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), which mandates that a newly-enacted law is prospective *unless* it provides *expressly* for retroactive application.[2] "The presumption against retroactive application best preserves the distinction between courts and legislatures: the former usually act retrospectively, settling disputes between persons, the latter usually act prospectively, setting the general rules for future conduct." *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991).

Despite the logical, clear application of United States Supreme Court precedent by the Eighth Circuit in concluding the Civil Rights Act of 1991 is clearly prospective in nature, Petitioner nevertheless asserts error. Yet, Petitioner's contentions in support

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2. The Eighth Circuit, in adopting *Bowen*, properly distinguished *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), which holds that a newly-enacted law must be applied to pending cases unless it provides expressly to the contrary or manifest injustice would result. *Bradley* did not involve *private* parties, as herein, but instead involved a pending claim for attorneys' fees against a public school district. Indeed, as noted by the Court in *Bradley*, courts "should struggle hard against a construction which will, by a retrospective operation, affect *the rights of parties*," *Bradley*, 416 U.S. at 717 (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)) (emphasis added).

of this alleged "error" are unpersuasive and unconvincing. First, Petitioner cites two (2) canons of statutory construction which, he asserts, compel the conclusion that the 1991 Act was *intended* by Congress to operate retroactively. First, Petitioner recites a "general presumption" that because Congress specifically denied retroactive application of Sections 402(a) and 109(c) of the Act, it is presumed that Congress intended the remainder of the Act to be non-retroactive. Petition for Writ of Certiorari, at p. 7. However, it is also a "familiar canon of statutory construction," *Consumer Product Safety Commission v. G.T.E. Sylvania Corp.*, 447 U.S. 102, 108 (1980), that the plain language of a statute must control in the absence of "clear evidence" of a "clearly expressed" congressional intent to the contrary. *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982). Indeed, Petitioner concedes the ambiguity of the language, and hence, the lack of a "clearly expressed" intent, by citing canons of statutory interpretation to determine congressional intent. The plain language of Section 402(a) is silent as to its retrospectivity. Accordingly, no intent of Congress for the Act to apply retroactively can be gleaned, as posited by Petitioner, from Section 402(a).

Secondly, Petitioner asserts that congressional intent of retroactivity can be inferred from the fact that to hold otherwise would result in Sections 402(b) and 109(c) being rendered redundant or superfluous. Petition for Writ of Certiorari, at p. 8. Thus, in Petitioner's view, the only purpose behind the sections is to "serve as exceptions to the general rule of retroactivity set forth in Section 402(a)." *Id.* Yet, it is clear from the legislative history of the Act, including the heated debate surrounding passage of the Act, that the purposes of Sections 402(b) and 109(c) are *not* to serve as exceptions to a "general rule of retroactivity," but, instead, to serve as "insurance policies" to *ensure* prospectivity for those legislators who vehemently opposed retroactivity. *E.g., Gersman*, 975 F.2d at 890. While it may be argued that the sections should

serve *some* purpose, said purpose need not be *Petitioner's* purpose.[3]

Last, Petitioner mischaracterizes and misinterprets the meaning and proper application of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *Bowen* dictates that absent clear congressional intent mandating retroactivity, newly-enacted statutes are to be applied prospectively only. The purpose behind this reasoning is evident: conduct should be assessed under the law that existed when the conduct occurs. *Bonjorno*, 494 U.S. at 855. This reasoning, Petitioner errantly asserts, compels the conclusion that the purpose behind *Bowen* is not served in the instant case because Petitioner, discharged in 1982, was discharged when "the law in the Eighth Circuit, and everywhere else, was that racially motivated discharge from employment violated Section 1981." Petition for Writ of Certiorari, at p. 10. This argument is wholly devoid of merit, and evidences Petitioner's inability to discern the fundamental and elementary distinction regarding the impact and effects of acts of the legislature as opposed to the judiciary. As noted by Justice Scalia, every law school student is cognizant of this distinction; that is, when the legislature acts, it acts *prospectively*. Conversely, when the judiciary acts, it interprets, and thus, acts *retroactively*. *Bonjorno*, 494 U.S. at 847 (Scalia, J., concurring) (citing *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982)). Accordingly, when this Court issued its ruling in *Patterson*, it stated what the status of the law of Section 1981 was *and always had been*, regardless of the errant holdings of lower courts to the

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3. Petitioner asserts that the "problem" with the Eighth Circuit's opinion is that it is based upon "speculation." Petition for Writ of Certiorari, at p. 9 n.1. Yet, Petitioner's citations to canons of statutory construction to glean congressional intent are also based upon "speculation." Apparently, it is proper for Petitioner to rely upon speculation to prove retroactivity, but it is wholly improper of the Eighth Circuit to do the same to prove prospectivity.

contrary. Thus, contrary to Petitioner's assertion, application of the Civil Rights Act to this case would *not* result in the parties being governed by the law as it existed in 1982. Instead, Respondent would be held accountable for conduct which was not in violation of Section 1981, as evidenced by the *retrospective* operation of *Patterson. See id.* Thus, at the time of the termination of Petitioner's employment, the law of Section 1981, *properly applied*, provided *no* cause of action for Petitioner. In summary, Petitioner relies upon the Eighth Circuit's *incorrect* interpretation of the law of Section 1981 to assert herein that fairness compels application of the Civil Rights Act of 1991 to the instant cause.[4] As noted above, however, Petitioner's contention ignores the fundamental distinction between actions of the judiciary and the legislature and, thus, lacks merit.

B. Petitioner Fails To Comply With Supreme Court Rule 10.1.

Petitioner asserts the decision of the Eighth Circuit below conflicts with the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992),[5] and, thus, this conflict "requires authoritative resolution by this court." Petition for Writ of Certiorari, at p. 11. Apparently, Petitioner is attempting to invoke Supreme Court Rule 10.1(a), which indicates that one of the reasons this Court will consider in granting certiorari is where Petitioner has demonstrated the existence of a conflict between

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4. Throughout Petitioner's writ, references to "fairness" abound. Yet, it is Respondent's position that interests of fairness, which Petitioner so vehemently professes and urges, compel denial of certiorari in this cause — this cause was, in essence, fully disposed of on not one, but two, separate occasions, and has spanned almost a decade. Fairness dictates this case, resuscitated only by judicial and procedural abuses, be permitted to end.

5. This panel decision cited by Petitioner in support of a conflict held the expert witness fees portion of the Civil Rights Act of 1991 retroactive. *Davis*, 976 F.2d at 1549-56.

two (2) courts of appeals. However, the panel decision cited by Petitioner in support of an alleged "conflict" with the decision below is, in fact, *not* in conflict with the decision below. That portion of the Ninth Circuit decision concerning the retroactive application of the Civil Rights Act of 1991 *was subsequently vacated* by the same panel. *Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993). Thus, contrary to Petitioner's assertion, the Ninth Circuit panel decision in *Davis* does *not* conflict with the decision below and, therefore, Petitioner fails to comply with Supreme Court Rule 10 in that he fails to allege a conflict necessitating review by this Court.[6]

C. This Court's Recent Grant Of Certiorari Of Two Cases Concerning The Issue Of The Retroactivity Of The Civil Rights Act Of 1991 Does Not Compel This Court To Grant Certiorari Herein.

Petitioner relies upon this Court's most recent grant of certiorari in two (2) cases, *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), and *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), in support of his contention that this Court should grant certiorari herein. Petitioner asserts that because these cases "squarely raise" the issue of retroactivity of the 1991 Act,

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6. While Respondent submits Petitioner has failed to comply with Supreme Court Rule 10, thereby warranting denial of the instant Petition, it recognizes its obligation to disclose to this Court a subsequent Ninth Circuit panel decision which held the Civil Rights Act of 1991 applicable to a cause pending at the time the 1991 Act was enacted. *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993). However, as noted by Petitioner, this Court has already granted certiorari on two (2) cases "squarely addressing" the issue of retroactivity. Thus, inasmuch as this issue is to be resolved by this Court, Respondent urges denial of certiorari herein. Stern, *supra* p. 7, at 470 ("[A] conflict will not necessarily result in the granting of certiorari if the issue is no longer a live one.") Moreover, this cause is nevertheless an inappropriate vehicle upon which to grant certiorari to resolve the issue of retroactivity. *See infra* Section II.C.

this shows that the issue of retroactivity is of such legal importance that review by this Court is warranted. Petition for Writ of Certiorari, at p. 6. To the contrary, this development warrants *denial* of certiorari in the instant case. As discussed in previous briefings before this Court, as well as evidenced by the Statement of the Facts recited herein, the procedural posture of this case, as well as its unique factual situation, renders this case an inappropriate vehicle upon which this Court should decide the issue of retroactivity. As set out earlier, this case twice has had mandates issue to dismiss this cause with prejudice, and twice it has been resuscitated by procedural manuevering and abuses. The general issue sought to be addressed is simply whether the Civil Rights Act of 1991 is to be applied to cases pending at the time of its enactment. This case, due to its unique factual and procedural posture, will not provide a clear ruling on this issue, but will instead generate more argument and confusion as advocates, as well as the judiciary, begin distinguishing the particular facts and posture of this case. If, in fact, as Petitioner asserts, the two (2) cases currently pending before this Court "squarely raise" the issue of retroactivity, particularly as it applies to Section 1981 in *Rivera*, this Court, in its discretion, should deny certiorari in this case and render its ruling upon *proper* vehicles for such grant.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals in its entirety.

Respectfully submitted,

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